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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92056510
Party	Plaintiff Republic of Texas Biker Rally, Inc.
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Attachments	Republic's Motion to Strike, for Default and for Judgment on the Pleadings (1.23.13).pdf (10 pages)(126765 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Registration of:

Registrant	:	Ogudo, Peter C.
Reg. No.	:	4,164,790
Mark	:	ADAM LOOPHOLE PRESENTS ROT APPAREL
Registration Date	:	June 26, 2012

REPUBLIC OF TEXAS BIKER RALLY, INC., Petitioner	:	
v.	:	Cancellation No. 92056510
PETER C. OGUDO, Registrant/Respondent	:	

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PETITIONER'S MOTION TO STRIKE RESPONDENT'S PURPORTED "ANSWER" AND FOR DEFAULT JUDGMENT OR, ALTERNATIVELY, FOR JUDGMENT ON THE PLEADINGS

Petitioner Republic of Texas Biker Rally, Inc. ("Petitioner") asks that registrant Peter C. Ogudo's ("Respondent's") purported "Answer" to Petitioner's Petition to cancel Registration No. 4,164,790 for the mark ADAM LOOPHOLE PRESENTS ROT APPAREL (the "LOOPHOLE Registration") be stricken for non-compliance with the applicable rules, that default judgment be entered against Respondent, or, alternatively, that Petitioner be granted judgment on the pleadings and that Respondent's LOOPHOLE Registration be cancelled.

Petitioner's Motion to Strike
Respondent's Purported "Answer" and for Default Judgment

Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, Petitioner hereby moves the Board for an order striking Respondent's purported answer to Petitioner's petition to cancel on the ground that the purported answer consists entirely of immaterial, impertinent and scandalous matter that fails to conform to the requirements of Rule 8(b) of the Federal Rules of Civil Procedure and, accordingly, that default judgment be entered against Respondent for failing to file an answer in compliance with the rules.[1]

This motion is based upon the attached brief, Petitioner's Petition to Cancel filed on November 27, 2012 (Dkt. No. 1), and Respondent's wholly-insufficient purported "Answer" thereto, filed on January 8, 2012 (Dkt. No. 4), and such other argument and evidence as may be presented to the Board on this motion.

Brief in Support of Petitioner's Motion to Strike and for Default

On November 27, 2012, Petitioner filed a petition to cancel ("Petition") Respondent's Registration No. 4,164,790 for the mark ADAM LOOPHOLE PRESENTS ROT APPAREL (the "LOOPHOLE Registration"). In thirty-three (33)

[1] Made applicable to proceedings before the Trademark Trial and Appeal Board by 37 CFR 2.116, Rule 12(f) provides:

> "(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act: (1) on its own; or (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading."

See also Scoa Industries, Inc. v. Kennedy & Cohen, Inc., 530 F.2d 953 at n. 1 (Fed. Cir. 1976).

numbered paragraphs, the Petition pleaded numerous grounds and two counts for relief, based upon the likelihood of confusion with and dilution of Petitioner's prior use of the marks "ROT" and "R.O.T" and based upon four prior registrations predominantly incorporating the terms "ROT" and "R.O.T" (the "ROT Marks") for identical categories of goods and services in which the LOOPHOLE Registration issued.

Under the Board's Scheduling Order issued on November 30, 2012, Respondent's answer to Petitioner's Petition was due to be served and filed no later than January 9, 2013.

I. Respondent's Purported Answer Should be Stricken

On or about January 4, 2013, Respondent filed by mail a document with a filing date of January 8, 2013 entitled "Answer to Dismiss Petition" containing twenty-six (26) paragraphs—none of which specifically admitted, denied or even addressed the allegations in the corresponding paragraphs of Petitioner's Petition—and consisting wholly of immaterial, impertinent and scandalous matter amounting at most to a scatological screed against Petitioner's Petition. Respondent's document is an "answer" in name only, as it does not permit Petitioner to determine which of its allegations are admitted or denied, or what claims are at issue. *See Ohio State University v. Ohio University*, 51 USPQ2d 1289, 1292 (TTAB 1999) (noting that the primary purpose of pleadings, under the Federal Rules of Civil Procedure, is to give fair notice of the claims or defenses asserted). Accordingly, Respondent's purported answer is tantamount to no answer being filed and should be stricken and default judgment entered.

Alternatively, Respondent should be required to promptly file an answer that conforms to the requirements of the Federal Rules of Civil Procedure.

II. Respondent's Purported Answer is Wholly Defective

Respondent's purported "Answer" wholly fails to comply with 37 C.F.R. 2.114(b)(1) and with the Federal Rules of Civil Procedure governing this proceeding and should be stricken.

Trademark Rule 2.116(a) provides that "[e]xcept as otherwise provided, and wherever applicable and appropriate, procedure and practice in interparty proceedings shall be governed by the Federal Rules of Civil Procedure." *See* 37 CFR § 2.116(a). An answer to a notice of opposition or petition to cancel corresponds to an answer to a complaint in a court proceeding, *see* 37 CFR § 2.116(c), and must contain specific admissions and/or denials of the allegations in the complaint along with any defenses to those allegations. *See* TBMP § 311.02.

Rule 8(b) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> "A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder."

Fed. R. Civ. P. 8(b). Under Rule 8(b), a respondent's answer must be directly responsive to the paragraphs of the petition to cancel; it should not merely

contain arguments in the nature of a brief or impertinent matter. *See Thrifty Corporation v. Bomax Enterprises*, 228 USPQ 62, 63 (TTAB 1985) (requiring an applicant to re-file its answer to a notice of opposition because applicant's filing lacked a specific response to each averment in the notice of opposition and was "basically argumentative rather than a proper responsive pleading to the notice of opposition"). Respondent's purported "Answer" does none of those things. Indeed, it does not even contain as many paragraphs as Petitioner's Petition and lacks any paragraphs responsive to Petitioner's Count II for Dilution of its marks.

Here, Respondent's January 8, 2013 filing entitled "Answer to Dismiss Petition" does not contain specific responses (i.e., an admission or denial) to each of the averments in the corresponding paragraphs of Petitioner's Petition, but instead contains impertinent (and scatological) materials and arguments in the nature of a brief (or, more precisely, a rant) as to why its mark should not be cancelled despite Petitioner's admittedly pre-existing registered and common-law ROT Marks. *See, e.g.*, Respondent's Purported "Answer" at ¶ 10 (contending that Petitioner's Petition "only portrays tyranny, dictatorship and colonizing of words in the dictionary and Basic English usage. It is also counter to free enterprise system."). As such, Respondent's January 8, 2013 filing is procedurally and substantively defective and should be stricken[2] and default

[2] The Board grants motions to strike in appropriate cases such as this. *See, e.g., American Vitamin Products, Inc. v. DowBrands Inc.*, 22 USPQ2d 1313 (TTAB 1992) (insufficient affirmative defenses stricken); *Order of Sons of Italy in America v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1222 (TTAB 1995); *Harsco Corp. v. Electrical Sciences Inc.,* 9 USPQ2d 1570, 1571-1572 (TTAB 1988) (immaterial allegation stricken); *Isle of Aloe, Inc. v. Aloe Crème Laboratories, Inc.*, 180 USPQ 794, 794 (TTAB 1974) (pleading stricken for failure to comply with requirement of Fed. R. Civ. P. 10(b) that each numbered paragraph be limited to a single set of circumstances).

judgment should be entered cancelling Respondent's LOOPHOLE Mark.[3] At minimum, Respondent should be ordered to promptly file an answer that is in proper form and conforms to the requirements of Rule 8(b), and that is properly served upon Petitioner's counsel.

Petitioner's Motion for Judgment on the Pleadings

Petitioner also asks that the Board grant Petitioner a judgment in its favor on the pleadings in this matter cancelling Respondent's LOOPHOLE Registration because Respondent does not contest, and in fact admits in its purported "Answer," the substantive allegations in Petitioner's Petition.

This motion is based upon the included briefing above and below, Petitioner's Petition to Cancel filed on November 27, 2012 (Dkt. No. 1), and Respondent's purported "Answer" thereto, filed on January 8, 2012 (Dkt. No. 4), and such other argument and evidence as may be presented to the Board on this motion.

Brief in Support of Petitioner's Motion for Judgment on the Pleadings

In its Petition, Petitioner contends in a detailed series of 33 paragraphs that it and its existing ROT Marks, the uses of which pre-date Respondent's claimed use of the mark in the LOOPHOLE Registration, are being damaged by Respondent's LOOPHOLE Registration, which is registered in the same classes

[3] Because of its procedural and substantive defects, Respondent's purported "Answer" fails to adequately apprise Petitioner and the Board of Respondent's defenses and is tantamount to no answer having been filed. *See Ohio State University v. Ohio University*, 51 USPQ2d 1289, 1292 (TTAB 1999) (noting that the primary purpose of pleadings, under the Federal Rules of Civil Procedure, is to give fair notice of the claims or defenses asserted). Accordingly, default judgment should be entered cancelling the Respondent's complained-of LOOPHOLE Registration. *See* 37 CFR §§ 2.106(a) and 2.114(a); Fed. R. Civ. P. 55(a) and 55(b) and TBMP § 312.

of goods and services as Petitioner's identified ROT Marks. *See generally* Petition.

As discussed above, Respondent's purported "Answer" contains only 26 paragraphs, none of which substantively correspond to the paragraphs in Petitioner's Petition and all of which fail to either specifically admit or deny the allegations contained in the correspondingly numbered paragraphs of Petitioner's Petition. *See generally* Respondent's "Answer to Dismiss Petition." An answer that fails to deny a portion of an allegation may be deemed to have admitted that portion. *See* 37 CFR 2.114(b)(1); TBMP 311.02(a). Thus, because Respondent's purported "answer" fails to deny any of the corresponding allegations of Petitioner's Petition, Respondent is deemed to have admitted the entirety of the allegations in Petitioner's Petition.

Moreover, Respondent's purported "answer" also notably admits that:

- Respondent did not use the LOOPHOLE mark in commerce until, at earliest, August 28, 2008, *see* Respondent's "Answer to Dismiss Petition" at ¶ 3;

- Petitioner's and Respondent's marks are used on identical goods, *see id.* at ¶16 ("The goods which separately bear both Petitioner's and Respondent/Registrant's marks may be identical …");

- Petitioner's and Respondent's marks are used in the same channels of trade and commerce, *see id.* at ¶16 ("[the] goods that separately bear both petitioner's and Respondent/Registrant's marks may pass through the same channels of trade and commerce ...");

and fails to in any way deny (and is therefore deemed to have admitted) that:

- Petitioner's use of each of its ROT Marks, including those contained in Petitioner's issued ROT Registrations and pending ROT Applications, pre-dates any alleged use by Respondent of the conflicting LOOPHOLE Mark, *see* Petition at ¶¶ 8 -16; and,

- That the USPTO already determined that there exists a likelihood of confusion between Petitioner's ROT and R.O.T. Marks and Respondent's subsequently adopted LOOPHOLE Mark contained in the LOOPHOLE Registration, *see* Petition at ¶¶ 26 – 27;

Thus, the unrefuted allegations in Petitioner's Petition sets forth a *prima facie* case for cancellation of Respondent's subsequent LOOPHOLE Registration for likelihood of confusion under 15 U.S.C. §1052(d) and dilution of Petitioner's famous registered and common law marks under 15 U.S.C. §1125(c).

A judgment on the pleadings is appropriate where, on the facts as deemed admitted, there is no genuine issue of material fact to be resolved, and the moving party is entitled to judgment, on the substantive merits of the controversy, as a matter of law.[4] *See* Fed. R. Civ. P. 12(c).

Here, Respondent's purported "Answer To Dismiss Petition" fails to refute Petitioner's factual allegations and is not only deemed to have, but in actuality, admits to and agrees with the substantive operative allegations of Petitioner's Petition, including the similarity of the respective marks, the identical channels of trade and the identical goods offered for sale by the respective parties, and the resemblances of Respondent's LOOPHOLE Mark with Petitioner's ROT Marks.

[4] *See also Kraft Group LLC v. Harpole,* 90 USPQ2d 1837, 1840 (TTAB 2009), *dismissed in favor of a cancellation proceeding*, slip op. Opposition No. 91185033 (TTAB September 5, 2011); *Media Online Inc. v. El Clasificado Inc.,* 88 USPQ2d 1285, 1288 (TTAB 2008); *Ava Enterprises Inc. v. P.A.C. Trading Group, Inc.,* 86 USPQ2d 1659, 1660 (TTAB 2008); *Baroid Drilling Fluids Inc. v. Sun Drilling Products*, 24 USPQ2d 1048, 1049 (TTAB 1992); *CBS Inc. v. Mercandante,* 23 USPQ2d 1784, 1787 (TTAB 1992); *International Telephone and Telegraph Corp. v. International Mobile Machines Corp.*, 218 USPQ 1024, 1026 (TTAB 1983); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE Civil 3d § 1367 *et seq*. (2011); and 2A *Moore's Federal Practice* ¶12.15 (2d ed. 1985).

Accordingly, because the material facts alleged in Petitioner's Petition are undisputed[5] and demonstrate as a matter of law that Respondent's ROT Registration is harming Petitioner by diluting Petitioner's ROT Marks and ROT Registrations and resulting in a likelihood of confusion, the Board should on the existing pleadings cancel Respondent's Registration No. 4,164,790 for the mark ADAM LOOPHOLE PRESENTS ROT APPAREL.

WHEREFORE, Petitioner Republic of Texas Biker Rally, Inc. requests that that its Motions be granted, that Respondent's purported "Answer" be stricken, and that a default judgment or a judgment on the pleadings be entered cancelling Respondent Peter C. Ogudo's ADAM LOOPHOLE PRESENTS ROT APPAREL Mark, Registration No. 4,164,790.

Respectfully submitted,

LAW OFFICES OF CARL F. SCHWENKER

By: /s/

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Dated: January 23, 2012

[5] Where no matters outside the pleading were included with the motion, it should be treated as a motion for judgment on the pleadings, not summary judgment. *International Telephone and Telegraph Corp. v. International Mobile Machines Corp.*, 218 USPQ 1024, 1026 (TTAB 1983).

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2013, I served this **PETITIONER'S MOTION TO STRIKE RESPONDENT'S PURPORTED "ANSWER" AND FOR DEFAULT JUDGMENT OR, ALTERNATIVELY, FOR JUDGMENT ON THE PLEADINGS** by mailing a copy thereof by First Class Mail, postage prepaid, addressed to Respondent's correspondence address of record as follows:

Peter C. Ogudo
P.O. Box 2574
Culver City, California 90231

By: /s/
Carl F. Schwenker